

Commonwealth of Kentucky Office of the Attorney General

ANDY BESHEAR ATTORNEY GENERAL Capitol Building, Suite 118 700 Capitol Avenue Frankfort, Kentucky 40601 (502) 696-5300 Fax: (502) 564-2894

OAG 17-009

April 21, 2017

Subject:

Whether the City of Frankfort may appropriate money to the Frankfort Independent School District to create kiosks to access the internet throughout the city, to upgrade technology to enable wireless internet at schools, and to purchase adver-

tising space to promote the schools.

Requested by:

Dr. Houston Barber, Superintendent,

Frankfort Independent Schools

Written by:

Taylor Payne, Assistant Attorney General

Syllabus:

The City may perform any function within its boundaries that is in furtherance of a public purpose and not in conflict with the Kentucky Constitution or statutes. The appropriations contemplated by the City are in furtherance of a public purpose and not in conflict with the Constitution or any

statute.

Statutes construed:

KRS 160.020; Ky Const. Section 156b; Ky Const. Section 179;

KRS 82.082; KRS Title XIII

OAGs cited:

OAG 84-62; OAG 99-5; OAG 99-10

Opinion of the Attorney General

Dr. Houston Barber, Superintendent of Frankfort Independent School District ("School District"), has requested an opinion of this office to address whether the City of Frankfort ("City") may appropriate money to the School District under certain conditions. With his request, Dr. Barber attached a pro-

posal of a partnership between the City and the School District, whereby the City would appropriate money to the School District for the creation of kiosks throughout the city that would provide a place for students and families to access the internet, for the purchasing of technology upgrades to provide wireless internet at each school in the School District, and the purchasing of advertising space to promote the schools in the School District. We advise that the City may appropriate money to the School District according to the conditions set forth in the proposal pursuant to Kentucky Revised Statute (KRS) 82.082.

Independent school districts embrace cities of either the first, second, third, fourth or fifth class, together with the territory within their limits and have a school census enumeration of two hundred or more children. KRS 160.020. The School District is an independent school district that shares common boundaries with the City. The School District is independent of the county school district, which consists of the remainder of the county outside of the boundaries of the School District. Although they share common boundaries, the School District and the City are distinct municipalities within the Commonwealth. The School District operates a high school, a kindergarten through eighth grade school, a preparation academy, and an early learning academy for children residing in the City.

In Kentucky, "a city possesses only those powers expressly granted by the Constitution and statutes plus such powers as are necessarily implied or incident to the expressly granted powers and which are indispensable to enable it to carry out its declared objects, purposes, and expressed powers." *City of Bowling Green v. T & E Elec. Contractors, Inc.*, 602 S.W.2d 434, 435 (Ky. 1980) (citation omitted). Section 156b of the Kentucky Constitution permits the General Assembly to create law that allows cities to "exercise any power and perform any function within their boundaries that is in furtherance of a public purpose of a city and not in conflict with a constitutional provision or statute." To that end, in 1980, the General Assembly enacted KRS 82.082, known as the city Home Rule, which states that:

(1) A city may exercise any power and perform any function within its boundaries, including the power of eminent domain in accordance with the provisions of the Eminent Domain Act of Kentucky, that is in furtherance of a public purpose of the city and not in conflict with a constitutional provision or statute.

(2) A power or function is in conflict with a statute if it is expressly prohibited by a statute or there is a comprehensive scheme of legislation on the same general subject embodied in the Kentucky Revised Statutes including, but not limited to the provisions of KRS Chapters 95 and 96.

The Kentucky Supreme Court has stated that KRS 82.082 "delegates all possible municipal powers to cities except those specifically denied to them." Dannheiser v. City of Henderson, 4 S.W.3d 542, 548 (Ky. 1999). This office has similarly interpreted KRS 82.082 to confer broad powers to cities that are performing functions within its boundaries and in furtherance of a public purpose. See OAG 84-62. Here, because the appropriations will fund projects occurring within the City's boundaries, KRS 82.082 provides the City with power to appropriate money to the School District if the funded projects will be in furtherance of a public purpose and will not conflict with our Constitution or various statutes.

A. Public Purpose

KRS 82.082 does not define the term "public purpose." However, Kentucky courts have instructed that to determine whether an appropriation is for a public purpose, the "test [is] not who receives the money, but the character of the use for which it is expended." Kentucky Bldg. Comm'n v. Effron, 220 S.W.2d 836, 837 (Ky. 1949). Kentucky courts and the General Assembly "have developed a broad definition of activities that may qualify as a public purpose." Dannheiser, 4 S.W.3d at 545-46 (citing Valla v. Preston St. Rd. Water Dist. No. 1, 395 S.W.2d 772 (Ky. 1965) and City of Owensboro v. McCormick, 581 S.W.2d 3 (Ky. 1979)). Kentucky courts require that "'public purpose' should be broadly construed to comport with the changing conditions of modern life." Id. at 546 (citing Eugene McQuillen, The Law of Municipal Corporations, § 39.19). In particular, this office has stated that "a public purpose has for its objective the promotion of public health, safety, morals, general welfare, security, prosperity, and contentment of all, or at least a substantial part of, the inhabitants or residents." OAG 99-5 (citing The Law of Municipal Corporations, § 39.19). A city's actions under KRS 82.082 must only "bear[] a reasonable relation to the public interest or welfare and [be]

within the scope of legitimate government activity." *Dannheiser*, 4 S.W.3d at 545 (citation omitted).

Based on the broad construction afforded to the term "public purpose," we advise that the appropriations described in the proposal between the City and the School District are in furtherance of a public purpose. Indeed, Kentucky courts have previously determined that appropriations to public schools for the benefit of education are made in furtherance of a public purpose. See Carman v. Hickman County, 215 S.W. 408, 411 (Ky. 1919) (stating that appropriations to public schools are so clearly public in their nature that no difference of opinion could exist); Board of Educ. of City of Corbin v. City of Corbin, 192 S.W.2d 951, 952 (Ky. 1946) (holding that an appropriation for public education is a valid public purpose). Providing internet access to students and their families outside of school and upgrading technology to provide wireless internet access within schools is reasonably related to promoting and enhancing the education received by students within the City and in the School District. Additionally, by appropriating money to promote the schools in advertisements, the City encourages enrollment within the School District and encourages residency within the City. Such an action may create both educational and economic benefits to the City and its residents.

B. Conflict with Constitution or Statute

Any appropriation by a municipality that is in furtherance of a public purpose must also not be in conflict with either the Kentucky Constitution or a Kentucky statute. KRS 82.082(1). An appropriation is in conflict with the Constitution or a statute if expressly prohibited by its language or preempted by a comprehensive scheme of legislation. KRS 82.082(2).

1. Express prohibition

Section 179 of the Kentucky Constitution governs appropriations from municipalities. That section states that:

The General Assembly shall not authorize any county or subdivision thereof, city, town, or incorporated district, . . . to obtain or appropriate money for, or to loan its credit to, any corporation, asso-

ciation or individual, except for the purpose of constructing or maintaining bridges, turnpike roads, or gravel roads[.]

Ky. Const. § 179. The purpose of Section 179 "is to prohibit public funds from being diverted for private use." Louisville Mun. Hous. Comm'n v. Pub. Hous. Admin., 261 S.W.2d 286 (Ky. 1953); see also Louisville Bd. of Ins. Agents v. Jefferson County Bd. of Educ., 309 S.W.2d 40, 41 (Ky. 1957) (stating "[t]hese constitutional provisions were added to the fundamental law of the state to prevent the investment of public funds in private enterprises . . . ").

Similarly, this office has taken the position that our courts will "[interpret] Section 179 to allow a county or city to donate money to a private corporation or institution if the purpose of the donation is a public one and one that the county or city is itself authorized to do." OAG 86-23. Here, however, the City contemplates appropriating money to another municipality, rather than for a private purpose.

Kentucky courts have addressed appropriations from one municipality to another in the context of Section 179. In *Board of Educ. of City of Corbin*, 192 S.W.2d at 952, the Court reviewed a city's action of giving "\$500 a month to the local board of education to supplement the salaries of teachers in an independent school district[.]" The Court stated that Section 179:

does not prohibit a municipality from participating with another municipality in a function it is permitted or required to perform itself, and by which its inhabitants will reap a commensurate benefit, nevertheless, it does prohibit a municipality from donating to a project from which no benefit may be received by it, or in which it may not independently engage.

Id. (internal citations omitted). The Court further stated that: "Two municipalities, for their respective purposes, may govern the inhabitants of a given territory; but the one may not interfere with the other in the exercise of a specified authority; nor may it, under Section 179 . . . reap a reward at the expense of another." As a result, the Court held that Section 179 prohibited the gift. *Id.*

The Court in Sawyer v. Jefferson County Fiscal Court, 392 S.W.2d 83 (Ky. 1965) distinguished Bd. of Educ. of City of Corbin. There, the Court reviewed the legality of a contract between the fiscal court and the board of education of a Kentucky county that entitled the county to use any school building or property owned by the board of education for recreational purposes in exchange for an annual rental fee. Sawyer, 392 S.W.2d at 84 The Court stated that the expenditure at issue in Corbin violated Section 179 because the city was seeking "to donate to a project in which it could not independently engage (public education), and from which it derived no benefit." Id. It distinguished the contract at issue on the basis that KRS 97.010(1) permitted the county to participate in a recreational program for its citizens. Id. The Court reasoned that because the county was authorized to lease facilities to be used for recreation, no basis existed for holding Section 179 barred the city from leasing these facilities from the board of education. Id. at 84-85.

The distinction between *Corbin* and *Sawyer* illustrates the limitations Section 179 places upon a city that appropriates funds to another municipality. In particular, Section 179 requires that the city have statutory authorization to engage in the function for which it will appropriate money. Both *Corbin* and *Sawyer* were decided prior to the enactment of KRS 82.082, and at a time when "cities required specific and discrete grants of power from the Commonwealth before they could individually address local problems." OAG 99-10. Notably, when the Court decided *Corbin*, cities had no specific grant of power to appropriate money for public education purposes. However, the legislative intent behind KRS 82.082 was to grant cities "more flexibility to handle local affairs." *Id.* Thus, pursuant to KRS 82.082, the City has specific authorization to appropriate money to a conterminous municipality, such as the School District. Accordingly, the City does not violate Section 179 if the City will receive a benefit from the appropriation.

Due to the enactment of KRS 82.082, the circumstances here are distinguishable from *Corbin* and are more similar to those in *Sawyer*. Unlike in *Corbin*, KRS 82.082 provides cities with the flexibility to address local problems, such as appropriating money to a conterminous school district to create kiosks for internet access, upgrade internet access at schools and advertise to promote its schools. Furthermore, unlike in *Corbin*, here the City receives a benefit from the appropriations to the School District. For instance, the City will reap the rewards

of citizens having a place to access the internet, of its students having greater access to the internet in schools, and increasing enrollment at the school district and residency in the City. Accordingly, Section 179 of the Kentucky Constitution does not expressly prohibit the appropriations by the City to the School District detailed in the proposal.

2. Preemption

A local ordinance may also be in conflict with a state statute, if the statute preempts the subject matter of the ordinance. In *Commonwealth v. Do, Inc.*, 674 S.W.2d 519, 521 (Ky. 1984), the Kentucky Supreme Court stated that the General Assembly preempts a subject matter from local regulation if:

(1) The subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

However, the Kentucky Supreme Court has pointed out that "the fact that the state has enacted legislation does not prevent local governments from establishing additional legislation or acting as long as there is no conflict between them." *Dannheiser*, 4 S.W.3d at 549 (citing *Do*, 674 S.W.2d at 522).

The General Assembly addressed matters of public education in Title XIII of the Kentucky Revised Statutes. However, although the appropriations detailed in the proposal between the City and the School District will be for the benefit of public education, the subject matter addressed by the City pertains to internet access and advertising to promote schools. Title XIII contains no indication of the General Assembly's intent to prohibit a local municipality from addressing issues concerning internet access or advertisement for its schools. The General Assembly's vast regulation of public education within the Commonwealth does not preempt local governments from addressing local concerns for

the purpose of benefiting the public education provided in that municipality. Furthermore, no reason exists to conclude that the City's participation in this subject matter would have an adverse effect on transient citizens of the Commonwealth. Thus, we do not find that the appropriations detailed in the proposal are preempted by state law. Accordingly, the City's appropriations are not in conflict with either the Kentucky Constitution or Kentucky statute.

C. Conclusion

In sum, we advise that KRS 82.082 grants the City broad authority to exercise powers and perform functions within its boundaries, including appropriating money to the School District for the purpose of establishing and improving internet access for students and their families both outside of and inside the schools and to advertise to promote the benefits afforded by the School District to residents of the City. We find no reason to conclude that the City's proposed appropriations are in conflict with either the Kentucky Constitution or Kentucky statute.

ANDY BESHEAR ATTORNEY GENERAL

Taylor Payne

Assistant Attorney General

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